

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LARRY THOMPSON, )  
Petitioner, )  
v. ) No. 20-659  
PAGIEL CLARK, ET AL., )  
Respondents. )  
- - - - -

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1 P R O C E E D I N G S

2 (11:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 20-659, Thompson against  
5 Clark.

6 Mr. Ali.

7 ORAL ARGUMENT OF AMIR H. ALI

8 ON BEHALF OF THE PETITIONER

9 MR. ALI: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 The Second Circuit holds that a  
12 criminal proceeding terminates in the accused's  
13 favor only if it affirmatively indicated that  
14 the accused is innocent.

15 That is wrong. A criminal proceeding  
16 terminates in the accused's favor when it ends  
17 and the prosecution has failed to obtain a  
18 conviction.

19 As this Court has recognized,  
20 Section 1983's favorable termination rule  
21 protects against parallel proceedings,  
22 inconsistent judgments, and collateral attack.  
23 That explains why the plaintiff in Heck had to  
24 go off and get his conviction overturned on  
25 direct appeal, habeas, or through a pardon. And

1     it explains why the plaintiff in McDonough  
2     satisfied the rule upon his acquittal.

3             It also explains why the dismissal of  
4     charges terminates the proceeding in the  
5     accused's favor. When charges have been  
6     dismissed, a civil suit is not parallel to,  
7     inconsistent with, or collaterally attacking  
8     anything.

9             As the Eleventh Circuit observed,  
10    every circuit to adopt the  
11    indications-of-innocence approach has mistakenly  
12    imported it from an unsubstantiated comment in  
13    the Restatement.

14            With very able counsel, Respondent  
15    could not come up with any plausible defense of  
16    that added inquiry and focuses most of his --  
17    his energy on record-specific arguments from the  
18    certiorari stage that divert from the question  
19    presented.

20            Respondent had a tall order. If he  
21    wants to inject his additional innocence inquiry  
22    into this federal statute, he had to show it was  
23    so well settled in 1871 that Congress would have  
24    taken it for granted. Instead, Respondent  
25    openly admits that there was no such

1 well-settled principle.

2 This Court's opinion can end there.

3 Even pretending that Respondent could fight to a  
4 draw, it would not be a basis for reading his  
5 additional inquiry into the statute. And  
6 Respondent is nowhere near a draw. As the  
7 Eleventh Circuit detailed, all jurisdictions,  
8 except for Rhode Island, adopted Petitioner's  
9 rule and understood that the dismissal of  
10 charges terminates the proceeding in the  
11 accused's favor.

12 I welcome the Court's questions if  
13 there are any.

14 JUSTICE THOMAS: Mr. Ali, before we  
15 get to the termination issue, favorable  
16 termination issue, don't we have to address  
17 whether or not there actually can be a malicious  
18 prosecution case or claim based upon a Fourth  
19 Amendment seizure?

20 MR. ALI: So I don't --

21 JUSTICE THOMAS: Or a -- an  
22 unreasonable seizure under the Fourth Amendment.

23 MR. ALI: So this Court held in Manuel  
24 that there is a Fourth Amendment claim for  
25 unreasonable seizure pursuant to legal process.

1 And that is the claim that is before this Court,  
2 and I want to be very clear on this, Petitioner  
3 is not asserting a standalone malicious  
4 prosecution claim.

5 You know, Respondent, before this  
6 Court, now at the merits stage, is asserting  
7 some sort of confusion in that respect because  
8 Respondent used the malicious prosecution label  
9 that is used, you know, throughout all of the --  
10 the circuits. As Chief Judge Pryor put it,  
11 that's the shorthand for this Manuel claim.

12 So, you know, we think the Court has  
13 already decided that the claim exists, Your  
14 Honor, but the -- the -- the -- the role that  
15 the analogy to malicious prosecution plays in  
16 this case is a particular one, and I'm happy to  
17 address that, Your Honor.

18 JUSTICE THOMAS: Please.

19 MR. ALI: Yeah. So our position is  
20 that the Fourth Amendment does not have a  
21 favorable termination element. This is not an  
22 argument that we import the elements of  
23 malicious prosecution into the Fourth Amendment.

24 But Petitioner brought his Fourth  
25 Amendment claim, his claim under Manuel,

1     pursuant -- using the vehicle of Section 1983.  
2     And this Court has held that when Congress  
3     enacted Section 1983, it is reasonable, because  
4     it's a species of tort liability, to assume that  
5     Congress would have taken for granted certain  
6     well-settled common law tort principles when it  
7     enacted the statute.

8             And so in -- the favorable termination  
9     rule or the analogy to malicious prosecution in  
10    this case takes place for all of the reasons  
11    that it took place in McDonough and in Heck.  
12    What this Court said is that when you are  
13    bringing a civil suit which challenges the  
14    initiation of a state judicial proceeding, that  
15    the relevant tort you analogize to is malicious  
16    prosecution and, in particular, that the  
17    favorable termination rule comes into play under  
18    Section 1983.

19            JUSTICE THOMAS:  What was the  
20    initiation?  Where was this initiated?  The  
21    state proceedings?

22            MR. ALI:  This was initiated in -- in  
23    -- in New York state court.

24            JUSTICE THOMAS:  No, I mean -- so I'm  
25    confused.  Which seizure are you -- at what



1 point was your -- was Petitioner seized and that  
2 -- that is the basis for this claim?

3 MR. ALI: Sure, Your Honor. So -- so  
4 the -- I promise to answer your -- your  
5 question, but let me just say the question  
6 presented here presumes a seizure pursuant to --  
7 to legal process. We don't think the Court  
8 needs to get into the question of what the  
9 particular --

10 JUSTICE THOMAS: And --

11 MR. ALI: -- seizure was.

12 JUSTICE THOMAS: -- the -- I think  
13 you're conflating two things. And I just want  
14 you to identify exactly where the seizure is and  
15 exactly where the proceeding begins.

16 MR. ALI: Right. So, in this case,  
17 Respondent never challenged this below, but  
18 there are two seizures in the record here.

19 First, as the United States admits in  
20 this case, the criminal complaint was filed  
21 while Mr. Thompson -- while the Petitioner was  
22 still in custody, and so process, legal process,  
23 was initiated, and Petitioner was -- we will  
24 have to show Petitioner -- you know, if  
25 Respondent is allowed to raise it at this late

1 stage, the Petitioner's seizure -- for the  
2 purposes of -- of -- of this particular seizure,  
3 we'll have to show that Petitioner's seizure was  
4 caused by the initiation of legal process,  
5 meaning he would have been released had that  
6 false criminal complaint not been filed.

7 The second seizure in this case, which  
8 has also been unchallenged since it was  
9 specifically ruled upon at the summary judgment  
10 stage and deemed proven at trial, you know, we  
11 heard nothing from Respondent on this seizure  
12 either, is that the -- there's Second Circuit  
13 precedent clearly holding that the restrictions  
14 when being released on recognizance and the  
15 compelled attendance in court hearings  
16 constitutes a seizure within the meaning of the  
17 Fourth Amendment.

18 You know, our position in this case,  
19 though, and I think what's critical for this  
20 Court to know is that the Second Circuit is  
21 perfectly capable of resolving those kind of  
22 late-breaking arguments that Respondent is  
23 making before this Court on remand. The --

24 JUSTICE ALITO: Suppose the -- the  
25 case had gone to trial, the criminal case had

1     gone to trial, and your client was actually  
2     convicted based on evidence entirely having  
3     nothing to do with the criminal complaint.

4                 Would you have a claim?

5                 MR. ALI: Well, if -- if he was  
6     convicted, we wouldn't be able to satisfy the  
7     favorable termination rule, so there would be no  
8     claim.

9                 JUSTICE ALITO: Even though he was  
10    arrested without probable cause you claim?  
11    Suppose he's arrested without probable cause,  
12    he's held for trial without probable cause, but  
13    then, at trial, the state comes up with  
14    completely different evidence and irrefutable  
15    evidence, and this individual is convicted. Is  
16    there a claim, a Fourth Amendment claim?

17                MR. ALI: So there is a Fourth  
18    Amendment violation in your hypothetical, but it  
19    is not cognizable under Section 1983. And --  
20    and I just -- this is an important point, so  
21    just to explain a little bit more, I mean, so a  
22    couple of responses.

23                It is always the case when the Court  
24    reads a prerequisite into the statute, separate  
25    and apart from the constitutional violation,

1     that certain constitutional violations will not  
2     be actionable.  So that was true in McDonough,  
3     right.  You could have had false evidence  
4     introduced to instigate the criminal proceeding,  
5     as your hypothetical just posited.

6             It could have been evidence that was  
7     likely to have affected the jury's verdict, but  
8     the plaintiff could have been convicted, and he  
9     would not have a claim because of the favorable  
10    termination rule, all the same in McDonough.  I  
11    could give the same hypothetical in the context  
12    of Heck.  So that is always true in these cases.

13            Now I think it's actually --

14            JUSTICE ALITO:  Well, my question is,  
15    why should there be any kind of a termination  
16    element to this claim?  It -- it's a claim that  
17    there was an unreasonable seizure.

18            MR. ALI:  So we --

19            JUSTICE ALITO:  What does that have to  
20    do with whether -- why is that at all dependent  
21    on the outcome of the trial?

22            MR. ALI:  So I think the Court's  
23    jurisprudence clearly distinguishes between  
24    those Fourth Amendment claims, which challenge  
25    seizures without legal process, as the Court put

1     it in -- in Wallace and in subsequent cases like  
2     McDonough -- or in subsequent cases, and  
3     seizures pursuant to legal process.

4             And in McDonough, we think the Court  
5     confronted this question, the exact same  
6     question, and it said, when you have -- you  
7     know, the gravamen of the claim necessarily  
8     challenges the initiation of state criminal  
9     proceedings, then the analogous tort is  
10    malicious prosecution and the favorable  
11    termination rule.

12            I don't want to fight too hard on this  
13    because, if there's no favorable termination  
14    rule at all, then the Second Circuit clearly  
15    erred in requiring affirmative indications of  
16    innocence, and I'd be glad to talk about the  
17    problems with that rule, but --

18            JUSTICE GORSUCH: I -- I'd like to  
19    jump in there if it's all right because that's  
20    what I'm a bit mystified by. If the Fourth  
21    Amendment doesn't require termination at all and  
22    malice, why would you fight those things?  
23    Wouldn't it be easier for your client to say  
24    it's a false imprisonment claim, starting  
25    whether by judicial process or by arrest, as in

1       this case, and it was unlawful from the start?

2               MR. ALI:   You know, we'll take the win  
3       on the alternative grounds.   We think the best  
4       and, you know, really only plausible reading of  
5       this case is that there's a favorable  
6       termination rule.   And we think that the  
7       interests that the Court identified in McDonough  
8       are actually significant, right?   The Court --

9               JUSTICE GORSUCH:   So you actually want  
10      to have to prove favorable termination.   You're  
11      just quibbling over -- over what that  
12      termination should look like, how favorable it  
13      has to be?   You say not so favorable.   They say  
14      very favorable.

15              MR. ALI:   Right.

16              JUSTICE GORSUCH:   But you -- you --  
17      you're willing -- you want to prove that and you  
18      want to prove malice too?

19              MR. ALI:   Well, Your Honor, I think  
20      that the inquiry would be different for malice,  
21      right?   But, you know, this is a -- it's -- and  
22      let me come back to your first question as well,  
23      but just because we're doing malice twice --

24              JUSTICE GORSUCH:   You haven't fought  
25      that, though.   I mean, malicious prosecution,

1     you know, has always required proof of malice,  
2     and you don't seem to dispute that. You seem to  
3     be making it awful hard to prove a Fourth  
4     Amendment claim.

5                 MR. ALI: Well, Your Honor, I think we  
6     have to remember that we're engaged in an  
7     interpretive inquiry here. And I think, really,  
8     the -- this Court --

9                 JUSTICE GORSUCH: I -- I -- I'm very  
10    concerned about that too. And one of the things  
11    I've noticed is this Court's never recognized a  
12    malicious prosecution claim under the Fourth  
13    Amendment. And it's reserved the question a  
14    couple of times now at least.

15                MR. ALI: Right.

16                JUSTICE GORSUCH: Isn't it time that  
17    we answer that before we decide what the  
18    elements of that claim should look like?

19                MR. ALI: I think the Court can very  
20    comfortably say all the parties agree there's no  
21    standalone malicious prosecution claim under the  
22    Fourth Amendment. I don't think that answers  
23    the question before the Court --

24                JUSTICE GORSUCH: Hold on.

25                MR. ALI: -- and the analytical

1 framework --

2 JUSTICE GORSUCH: Whoa. Whoa. That  
3 -- that was a big moment there, I think. So --  
4 so -- so you agree that there is no standalone  
5 malicious prosecution claim under the Fourth  
6 Amendment?

7 MR. ALI: In which you just pull in  
8 the torts of malicious prosecution into the  
9 Fourth Amendment.

10 JUSTICE GORSUCH: Okay.

11 MR. ALI: We don't believe the origin  
12 of this favorable termination rule is the Fourth  
13 Amendment. It is the analytical framework that  
14 the Court clearly set out in Manuel and that  
15 Chief Judge Pryor adopted, right?

16 JUSTICE GORSUCH: Well, putting it  
17 that way --

18 JUSTICE ALITO: You have a Fourth --  
19 your claim is a Fourth Amendment claim, right?

20 MR. ALI: Yes.

21 JUSTICE ALITO: And you want to import  
22 into that an element from the tort of malicious  
23 prosecution, right?

24 MR. ALI: The Fourth Amendment has no  
25 favorable termination element, just like the Due



1 Process Clause has no favorable termination  
2 element or no probable cause element, right?  
3 That was McDonough.

4 The Court didn't say we're importing  
5 the favorable termination rule into Section 1983  
6 and that means you now have to prove an absence  
7 of probable cause under the Due Process Clause.  
8 It's the same --

9 JUSTICE ALITO: Does it have any kind  
10 of --

11 MR. ALI: -- I think that's conflating  
12 the inquiry.

13 JUSTICE ALITO: -- does it have any  
14 kind of a termination element? Does termination  
15 have anything to do with it?

16 MR. ALI: Well, okay, so the  
17 interpretive inquiry that we're engaged in here  
18 says that this is a species of tort liability  
19 enacted by statute. So it makes sense at the  
20 initial, the first step, to assume that Congress  
21 would have assumed that certain prerequisites  
22 that existed at common law would be read into  
23 the statute.

24 Now this is where we get to the malice  
25 question, which is a different question, because

1 the second stage with the Court -- which the  
2 Court set forth in Manuel and which Chief Judge  
3 Pryor also applies is that you have to look at  
4 whether that well-settled principle is  
5 consistent with the statute that Congress  
6 actually enacted, meaning the purpose and values  
7 of the Fourth Amendment.

8 The Court, I think, would come to the  
9 different conclusion in the context of reading  
10 malice into Section 1983 because the Fourth  
11 Amendment itself says reasonable, objective  
12 inquiry. And so there's -- it's pretty hard to  
13 square a malice requirement --

14 JUSTICE GORSUCH: So -- so you don't  
15 --

16 MR. ALI: -- in a way that --

17 JUSTICE GORSUCH: -- think we should  
18 have malice and you don't think we should have a  
19 favorable termination requirement. And so why  
20 wouldn't we just have a Fourth Amendment as in a  
21 Manuel claim? The most analogous might be a  
22 false arrest.

23 MR. ALI: So, Your Honor, I want to be  
24 very clear here. I don't think there should be  
25 malice or Fourth Amendment read into the Fourth

1 Amendment. I do believe that when one brings a  
2 claim of unreasonable seizure pursuant to legal  
3 process, just like when one necessarily  
4 challenges the initiation of legal process under  
5 the Due Process Clause, that Congress would have  
6 assumed -- and I think this is just McDonough --  
7 would have assumed a favorable termination rule  
8 and that that rule is consistent with Section  
9 1983.

10 So we do think that the best reading  
11 of this Court's case law is that there's a  
12 section -- that there's a favorable termination  
13 rule. And if I could come back to just --

14 JUSTICE KAVANAUGH: You -- you don't  
15 want it to be just false arrest, though, because  
16 you lost the false arrest claim --

17 MR. ALI: Well, Your --

18 JUSTICE KAVANAUGH: -- in this case.

19 MR. ALI: -- Your Honor, I think it's  
20 pretty hard at this point to get to false arrest  
21 as the analogy. I mean, the Court said that at  
22 bottom the analogy -- the reason that the Due  
23 Process Clause -- claim, the assumed due process  
24 claim in McDonough was analogized to malicious  
25 prosecution was that it was undertaken pursuant

1 to legal process. That was the language in  
2 McDonough.

3 And Heck said, I mean, it's pretty  
4 clear, the common law cause of action for  
5 malicious prosecution provides the closest  
6 analogy to claims of the type considered here  
7 because, unlike the related cause of action for  
8 false arrest or imprisonment, it permits damages  
9 for confinement imposed pursuant to legal  
10 process.

11 JUSTICE KAVANAUGH: But there's a  
12 misfit, I think you're acknowledging, between  
13 the Fourth Amendment and this kind of malicious  
14 prosecution kind of claim that the courts of  
15 appeals have generally recognized.

16 But I think you're telling us, well,  
17 just muddle along with that and don't worry  
18 about it because that's not the question  
19 presented. Is that an accurate summary of what  
20 you're --

21 MR. ALI: Well --

22 JUSTICE KAVANAUGH: -- suggesting?

23 MR. ALI: -- we think it's pretty  
24 clear that for the reasons stated in McDonough  
25 the favorable termination rule exists. We do

1 think -- and I think I -- I'd like to bring the  
2 Court back to the question presented because I  
3 do think that the common law adopted a very,  
4 very clear rule here that is easy for courts to  
5 apply, right? Two functions for the favorable  
6 termination rule.

7 First function: Let's try to avoid  
8 parallel litigation of probable cause and guilt.  
9 How do they resolve that? The solution is  
10 require that the proceeding be over.

11 Second function: Let's avoid  
12 inconsistent judgments and collateral attack of  
13 judgments. How do we ensure that that function  
14 is met? Let's require that there have been no  
15 conviction at the end of the proceeding.

16 A very straightforward rule. We don't  
17 think that's an accidental thing, as Justice  
18 Scalia pointed out in his Heck majority. The  
19 reason the court turns to the common law is  
20 because those rules were developed over the  
21 centuries.

22 JUSTICE BREYER: Well, that's true.  
23 But I'm now slightly confused because I -- I  
24 usually read briefs, and I thought the question  
25 presented -- I didn't know about all this 1983

1 business -- it's something they said in the  
2 Second Circuit, a plaintiff asserting a  
3 malicious prosecution claim under 1983 must show  
4 that the underlying criminal proceeding ended in  
5 a manner that affirmatively indicates his  
6 innocence. And we're arguing about whether  
7 that's so, is that right?

8 MR. ALI: Right, Your Honor. I had  
9 stopped --

10 JUSTICE BREYER: Okay. If that's  
11 right, what do you do if, as you want to say,  
12 no, it doesn't?

13 MR. ALI: Right.

14 JUSTICE BREYER: Okay. So the  
15 Assistant DA is there testifying. Why do you  
16 not prosecute this guy? You dismissed it. To  
17 tell you the truth, Your Honor, we have  
18 hundreds, maybe thousands of cases. We have a  
19 very big staff. We can't handle all this.

20 And so we, in fact, do dismiss quite a  
21 few cases, an awful lot, because we just can't  
22 handle them. We take the more serious ones.  
23 Why did you dismiss this one? Honestly, Your  
24 Honor, I can't find anybody in the office who  
25 remembers. Okay? I can tell you our general

1 policy.

2 Now what do you say?

3 MR. ALI: Your Honor, in that case,  
4 there's been no conviction and it sounds like  
5 the proceeding is over if the charges were  
6 dismissed, and nothing estops the plaintiff  
7 there from bringing his Fourth Amendment claim  
8 for unreasonable seizure pursuant to legal  
9 process.

10 And that is the --

11 JUSTICE BREYER: And so what the DA  
12 will say, I'll tell you what, Your Honor, go  
13 ahead, hold it. We're going to have to triple  
14 our staff or we're going to have to prosecute a  
15 lot of people who have very, very appealing  
16 personal conditions such that we feel we're  
17 being -- going to be doing injustice if we go  
18 bring a case against him in a criminal court.

19 And you say?

20 MR. ALI: Your Honor, the favorable  
21 termination rule was never intended and never  
22 served the function of filtering cases that  
23 are -- you know, have foundation or don't have  
24 foundation.

25 So we think that, you know, the manner

1 of dismissal can go to whether there was  
2 probable cause or not. The example you gave to  
3 me sounds like it would be pretty neutral as to  
4 whether probable cause existed or not, but it  
5 would not foreclose a civil suit.

6 CHIEF JUSTICE ROBERTS: Just one more  
7 question, counsel. You do not embrace the  
8 Laskar test, right? You don't --

9 MR. ALI: We do.

10 CHIEF JUSTICE ROBERTS: Well, but it  
11 seems to me you're focused much more on finality  
12 than assessing whether the -- that finality is  
13 consistent with innocence.

14 MR. ALI: So, Your Honor, the Laskar  
15 test was that there's no requirement of an  
16 indication of innocence, and what you were  
17 looking for was whether there was a judgment  
18 that is inconsistent with innocence.

19 And this is important. It takes place  
20 at a categorical level, and Chief Judge Pryor  
21 says that. He several times says, you know,  
22 inconsistent with innocence, that is, it ended  
23 in a conviction or admission of guilt.

24 CHIEF JUSTICE ROBERTS: And you -- you  
25 say in your brief that the best thing that can



1     happen for a defendant is to have the charges  
2     dismissed, right?

3                 MR. ALI:   Yes.

4                 CHIEF JUSTICE ROBERTS:   Well, what if  
5     they're dismissed pursuant to an agreement that  
6     says, okay, you were -- you were the number two  
7     person in this vicious gang and you've killed  
8     five people and all that, but we want you to  
9     testify against the number one person, and in  
10    exchange, we're going to dismiss the charges?

11                Is -- is -- is that consistent with  
12    innocence?

13                MR. ALI:   Well, Your Honor --

14                CHIEF JUSTICE ROBERTS:   It's a  
15    dismissal and it's a pretty good thing for him,  
16    I guess, but I don't think anybody would look at  
17    that and say, you know, that's not inconsistent  
18    with your innocence.

19                MR. ALI:   Under our test, the  
20    dismissal in that case would be a favorable  
21    termination, but, as the common law courts  
22    recognized, the manner of dismissal, and so that  
23    agreement, would all but doom the Fourth  
24    Amendment claim.   That person is never going to  
25    be able to prove that there was no probable

1 cause or presumably at least there's going to be  
2 a lot of evidence here, and if there's an  
3 agreement, you know, all but estopped for  
4 reasons completely separate and apart from the  
5 favorable termination rule, which was, as common  
6 law courts put it, a technical prerequisite  
7 protecting against parallel litigation,  
8 inconsistent judgments, and collateral attacks.

9 So what we're looking for is what  
10 common law courts looked for, it's what the rule  
11 in Heck and --

12 JUSTICE BREYER: So common law courts  
13 really did a -- I stole this bread to feed my  
14 starving children, and the DA says okay, okay, I  
15 understand, unlike, et cetera, I won't prosecute  
16 you.

17 Now you say, ah, good, wonderful. We  
18 now have a -- a -- a -- a malicious prosecution  
19 claim. Right?

20 MR. ALI: So, Your Honor, common law  
21 courts carefully guarded the technical favorable  
22 termination prerequisite, and they understood  
23 that what Your Honor just described very much  
24 might doom. I'll direct you to Clark v.  
25 Cleveland, which is really kind of the canonical

1 case by the New York Court of Appeals. It  
2 recognized that certain compromises or forms of  
3 mercy may be, I think the word it used,  
4 "insurmountable" when it comes time to actually  
5 prove that there was an absence of probable  
6 cause. But they did not conflate it --

7 JUSTICE BREYER: No, I stole the  
8 bread. I mean, it's Jean Valjean. I stole it  
9 and -- and -- and, yeah, to feed my starving  
10 children. I'm just saying your -- your view is,  
11 yep, there is a malicious prosecution claim,  
12 this is great, and, well, I know four lawyers  
13 who will bring it, and there we are.

14 MR. ALI: Well --

15 JUSTICE BREYER: And so next time,  
16 that DA doesn't give in to that argument.

17 MR. ALI: Well, remember, Your Honor,  
18 everyone here agrees that Petitioner's going to  
19 have to prove his claim. He still has to prove  
20 the absence of probable cause, he has to prove  
21 causation, and he has to overcome, had it not  
22 been asserted, the defense of qualified  
23 immunity.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Thomas, anything further?

2 JUSTICE THOMAS: None for me, Chief.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: As I understand what  
5 happened, your client was arrested without  
6 probable cause, and, eventually -- he was held  
7 for 39 hours and then released on his own  
8 recognizance, and sometime during that period  
9 the criminal complaint was filed.

10 Would he have been released any sooner  
11 had the criminal complaint not been filed?

12 MR. ALI: Your Honor, what we'll have  
13 to prove -- and at least one of the seizure  
14 theories -- we, of course, have the Second  
15 Circuit precedent that compelled attendance and  
16 that the conditions are a seizure. But setting  
17 that aside for a moment, Your Honor, what we  
18 would have to prove for that first seizure is  
19 that he would have been released had that false  
20 criminal complaint not been filed.

21 In other words, had -- had Respondent  
22 told the truth of what had happened to the  
23 prosecutor, he would have been released then  
24 because he had done nothing criminal. There  
25 would have been nothing to hold him for.

1           The reason he was held was because and  
2    -- and solely because -- and that's the  
3    causation piece -- solely because of fabricated  
4    evidence that was produced by Respondent.

5           JUSTICE ALITO: You would have to  
6    prove what went on in the DA's office? So the  
7    -- the assistant DA who was handling this would  
8    say, well, you know, I expected this police  
9    officer to come tell me what actually happened  
10   before the initial appearance, and if I wasn't  
11   satisfied at that point, I would have -- we  
12   would have released him?

13          MR. ALI: So, Your Honor, on the  
14   causation point, these multiple actor cases,  
15   causation's really hard to prove, and that's why  
16   we don't see a lot of these claims unless  
17   there's really serious misconduct being alleged.

18          And -- and what you typically have to  
19   prove is either a deliberate or reckless  
20   disregard for the truth, and it's precisely  
21   because of what Your Honor just said, if you  
22   don't have -- when you have that, that's when  
23   you can say that it effectively, you know,  
24   prevents the prosecutor from making an  
25   independent judgment as to probable cause.

1                   And on top of that, you typically have  
2     to prove that it was the sole basis for  
3     initiating the proceeding because, if there's  
4     independent probable cause, well, then you can't  
5     satisfy the causation requirement.

6                   JUSTICE ALITO: And your claim is that  
7     your client was continuously seized after that  
8     point even though he was released on his own  
9     recognizance because he was required to come  
10    back to court? Is that it?

11                  MR. ALI: So, Your Honor, there was a  
12    seizure at the time that the legal process was  
13    initiated. I don't think the way the Court has  
14    looked at it is that it's a continuing seizure.  
15    I think it's just that it -- that claim doesn't  
16    accrue until favorable termination, is how we  
17    would look at it.

18                  And under the Second Circuit precedent  
19    that Respondent never challenged below, there  
20    were additional seizures by virtue of the  
21    restrictions when he was released on  
22    recognizance --

23                  JUSTICE ALITO: Well, who --

24                  MR. ALI: -- and on the compelled  
25    attendance.

1 JUSTICE ALITO: -- who effected -- who  
2 effected these -- these subsequent seizures?  
3 The judge?

4 MR. ALI: Under the Second Circuit  
5 case law, what's the theory? Is that -- is that  
6 Your Honor's question?

7 JUSTICE ALITO: Under the correct  
8 understanding of the law as you are explaining  
9 it to us, who effected the seizures that  
10 occurred after the initial appearance?

11 MR. ALI: So, Your Honor, I think that  
12 the -- the best authority this Court has on that  
13 is Justice Ginsburg's concurrence in Albright.  
14 We don't think the Court should get into any of  
15 this.

16 Remember, like just last term, the  
17 Court decided a question about what seizures  
18 meant, and it took 50 pages of historical  
19 analysis to get to that result with a divided  
20 opinion. This is an issue that Respondent just  
21 injected into the case in the first instance in  
22 its brief in opposition.

23 We think what we need from this Court  
24 is a resolution of the question that was decided  
25 by the court of appeals, whether there is an

1 affirmative indications-of-innocence requirement  
2 under Section 1983, so that we can move on and  
3 litigate these questions about the merits.

4 JUSTICE SOTOMAYOR: I have a --

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor?

7 JUSTICE SOTOMAYOR: Am I to understand  
8 you correctly that what you're claiming is a  
9 Manuel-type fabrication of evidence to initiate  
10 the charges?

11 MR. ALI: Yes.

12 JUSTICE SOTOMAYOR: And how are you  
13 not doomed by your adversary's fair trial claim  
14 where the jury found probable cause to arrest?  
15 Pardon my ignorance, but I thought that the jury  
16 there was charged that any probable cause to  
17 arrest on any charge was enough, and the jury  
18 voted for respondents.

19 MR. ALI: Right.

20 JUSTICE SOTOMAYOR: So why doesn't  
21 that doom you here?

22 MR. ALI: So, Your Honor, I just want  
23 to be precise because there are two claims. So  
24 you first mentioned the fair trial claim, which  
25 is a due process claim.



1 JUSTICE SOTOMAYOR: Right.

2 MR. ALI: And that claim doesn't turn  
3 on probable cause at all. There was no  
4 instructions related to probable cause with  
5 respect to the fair trial claim. That arises on  
6 a due process standard, which turns on things  
7 like materiality at trial, which have nothing to  
8 do with a Manuel claim, right?

9 So, if the jury concluded that the  
10 fabricated evidence would not have likely  
11 affected a jury's verdict at the criminal trial,  
12 that would be a basis for rejecting the fair  
13 trial claim. It would not at all be a basis for  
14 concluding there was probable cause at the time  
15 that Petitioner was seized. So they're just two  
16 different constitutional claims addressing two  
17 different things.

18 Where probable cause came in, Your  
19 Honor, was with respect to the false arrest  
20 verdict. And, you know, both the false arrest  
21 verdict -- and I'll note these are, again, all  
22 arguments that are being raised at kind of a  
23 last -- a late-breaking stage here that we think  
24 the Second Circuit is perfectly capable of  
25 dealing with.

1                   But the false arrest and the unlawful  
2                   entry claims that Respondent refers to, all of  
3                   those were assessed from before the officers  
4                   even entered Mr. Thompson's apartment, when you  
5                   have officers responding to, on Respondent's own  
6                   terms, what was kind of an ongoing child abuse  
7                   claim.

8                   The fact that the jury might have  
9                   found probable cause at time one with that  
10                  information does not at all establish that there  
11                  was probable cause, you know, many hours later  
12                  when the false criminal complaint was filed and  
13                  doesn't even --

14                 JUSTICE SOTOMAYOR:   And --

15                 MR. ALI:   -- necessarily --

16                 JUSTICE SOTOMAYOR:   -- all of these --

17                 MR. ALI:   -- relate to the same crime.

18                 JUSTICE SOTOMAYOR:   -- side claims  
19                  that Justice Gorsuch and Justice Alito have  
20                  asked you about, whether there is a Fourth  
21                  Amendment claim, all of those issues, those have  
22                  not been addressed by the Second circuit?  They  
23                  were not raised below, correct?

24                 MR. ALI:   That's right.  Respondents'  
25                  theory has kind of shifted throughout this.  It

1 was Respondent in the Second Circuit who  
2 actually grounded all of these requirements in  
3 the Fourth Amendment below. And we were  
4 arguing, no, they don't come from the Fourth  
5 Amendment; there's no favorable termination rule  
6 or malicious prosecution tort in the Fourth  
7 Amendment.

8           So we were advocating Justice Gorsuch  
9 and Justice Alito's points below, and we've  
10 stuck to the clear line of kind of this Court's  
11 jurisprudence which finds that when a claim  
12 necessarily challenges for good reason, right,  
13 we're talking about challenging an ongoing state  
14 judicial proceeding, that you analogize to the  
15 tort of malicious prosecution and require a  
16 favorable termination.

17           CHIEF JUSTICE ROBERTS: Justice Kagan?

18           JUSTICE KAGAN: Mr. Ali, you said --  
19 you said in your brief and then you repeated it  
20 here in your opening statement that if the  
21 common law courts were divided on the nature of  
22 the favorable termination rule, you win.

23           And I'm just wondering why that's so.  
24 Why is it that if there's a draw as to the  
25 common law, we don't look to -- we don't -- we

1     don't say, okay, the common law doesn't tell us  
2     much. We have to think about the Fourth  
3     Amendment and its purposes and our precedent  
4     respecting it. Why -- why do you win if there's  
5     a draw on the common law?

6             MR. ALI: So, Your Honor, I think it  
7     depends precisely on what the draw is about. I  
8     made that in -- in context of the question  
9     presented, where what Respondent, what the  
10    Second Circuit has -- has put forward is that  
11    there's additional -- an additional inquiry,  
12    right? It's not just that it's got to be  
13    terminated and that it kind of terminates in  
14    favor of the accused in our sense, right, that  
15    the -- that there was no conviction. Everybody  
16    agrees that at a minimum those are required.

17            But what they're saying is there's  
18    also this additional inquiry into innocence. So  
19    this is where the mini-trials come into play.  
20    This is where, you know, we're digging into a  
21    criminal record to see whether there have been  
22    indications of innocence through --

23            JUSTICE KAGAN: Yeah, yeah, I get  
24    that. But, like, if half the courts do that and  
25    half the courts don't, why do you win?

1                   MR. ALI: Well, because what we're  
2     doing here is interpreting a federal statute,  
3     and if Respondent wants to come forward and say,  
4     well, this federal statute has this additional  
5     requirement, I think he's got to have a  
6     statutory hook. And one of those statutory  
7     hooks, the only one we could think of, the one  
8     the Second Circuit thought was there, but it  
9     mistakenly relied on the Restatement, was that  
10    that was well settled at common law.

11                  And so, you know, Congress -- another  
12    way to put it is Congress would have only taken  
13    for granted that initial -- that additional  
14    inquiry if it were somehow pervasive at the  
15    time. And to read it into an otherwise silent  
16    statute, I think that's what Respondent's got to  
17    show.

18                  It doesn't really matter at the end of  
19    the day because, as Chief Judge Pryor put it,  
20    we've got the well-settled principle, the vast  
21    majority of courts at common law applied our  
22    rule, and only Rhode Island applied Respondents'  
23    rule.

24                  CHIEF JUSTICE ROBERTS: Justice  
25    Gorsuch.

1 JUSTICE GORSUCH: How are we supposed  
2 to decide what the elements of a malicious  
3 prosecution claim are under the Fourth Amendment  
4 if we're not sure such a thing exists?

5 MR. ALI: We are not asking the Court  
6 to decide what -- the elements of a standalone  
7 Fourth Amendment due process --

8 JUSTICE GORSUCH: You're asking us to  
9 decide what this element of favorable  
10 termination looks like in a malicious  
11 prosecution claim, and -- and yet, as we  
12 discussed, counsel, we're not sure -- you're not  
13 sure it should be under the Fourth Amendment.  
14 Maybe it should be under procedural due process.  
15 Maybe the Fourth Amendment claim should look  
16 very different than a malicious prosecution  
17 claim because we're interpreting a statute and  
18 the Fourth Amendment.

19 What do we do about that fact? What  
20 do we do about the fact that you're asking us to  
21 define an element of a claim that may not exist?  
22 How many cases should this Court continue down  
23 the road of assuming that which may not exist?

24 MR. ALI: So I worry I haven't been  
25 clear, so let me try one more time to -- to do

1     this. Our claim exists. It is the claim that  
2     the Court recognized in Manuel.

3             JUSTICE GORSUCH: Okay.

4             MR. ALI: Our --

5             JUSTICE GORSUCH: Put that aside  
6     because, as I read the record, lots has shifted  
7     between -- on both sides in this case. As I  
8     read the record, you -- you raised a malicious  
9     prosecution claim below. And just work on this  
10    assumption, okay? And now you're trying to  
11    slide it under Manuel, all right?

12            Let's just stick with a malicious  
13    prosecution claim. If that's what's before us,  
14    assume that's before us, what should we do about  
15    the fact -- and if you could just answer the  
16    question -- what should we do about the fact  
17    that we're not sure it exists? Shouldn't we  
18    answer that predicate question at some point?

19            MR. ALI: Your Honor, we think the  
20    Court could start its opinion by saying  
21    Respondent is alleging that we -- we asserted a  
22    standalone malicious prosecution claim, and no  
23    such claim exists under the Fourth Amendment.

24            JUSTICE GORSUCH: Okay.

25            MR. ALI: That is not the argument

1     Petitioner is making here. And the question  
2     presented --

3             JUSTICE GORSUCH: Okay. Okay. So  
4     then you'd say yes, there is no such claim, but  
5     we still win anyway.

6             MR. ALI: Well, the question presented  
7     presumes the claim is unreasonable seizure  
8     pursuant to legal process, which is the claim of  
9     Manuel.

10            JUSTICE GORSUCH: All right.

11            MR. ALI: And there was no confusion  
12     at the cert stage when we used that language.

13            JUSTICE GORSUCH: I got that. I got  
14     that. Is part of this about the accrual rule  
15     for statute-of-limitations purposes, that a  
16     malicious prosecution claim doesn't accrue until  
17     dismissal? And that's advantageous?

18            MR. ALI: Well, Your Honor, I think  
19     it's -- I -- I think that there is -- it does  
20     defer the claim. I mean, the favorable  
21     termination rule is a deferral of accrual. It's  
22     more just than that it's advantageous. It's  
23     avoiding the problems that were identified in  
24     McDonough by forcing a defendant to sue the  
25     people who have made the decision to prosecute



1 him and then potentially waive his Fifth  
2 Amendment right of incrimination and give into  
3 discovery. All of those same interests come  
4 into play in this claim as in --

5 JUSTICE GORSUCH: You could stay a  
6 case, though, too, right?

7 MR. ALI: Well, and that's what --  
8 exactly what the Court rejected in McDonough,  
9 right? So the respondent in McDonough said just  
10 stay it like in Wallace. And what the Court  
11 said very specifically was, well, in Wallace,  
12 you were dealing with false arrest, where there  
13 may --

14 JUSTICE GORSUCH: Got it.

15 MR. ALI: -- never be charges.

16 JUSTICE GORSUCH: Got it. I do -- I  
17 do have a few more questions and I hate to  
18 occupy so much time, but I got that one.

19 Why didn't your client bring a -- a  
20 malicious prosecution claim under New York law  
21 in state court, where the favorable termination  
22 requirement is just exactly as you describe it?

23 MR. ALI: Well, Your Honor, because  
24 Section 1983 permitted him to sue under the  
25 Fourth Amendment and --

1 JUSTICE GORSUCH: No, I understand,  
2 but we all have choices in pleading. And I'm  
3 just curious, is there a reason why he -- he  
4 didn't pursue it in -- in state court?

5 MR. ALI: Your Honor --

6 JUSTICE GORSUCH: -- with a more  
7 advantageous legal rule?

8 MR. ALI: I actually don't know. I  
9 wasn't involved in --

10 JUSTICE GORSUCH: All right.

11 MR. ALI: -- at the trial stage. I'm  
12 not sure why the decision was made. Sometimes  
13 --

14 JUSTICE GORSUCH: Okay.

15 MR. ALI: -- plaintiffs do assert the  
16 --

17 JUSTICE GORSUCH: No, that -- that's  
18 fair enough.

19 MR. ALI: Yeah.

20 JUSTICE GORSUCH: And then Manuel, why  
21 -- why isn't this different than Manuel?  
22 Because, here, your client was seized by an  
23 arrest at -- in the first instance, whereas, in  
24 Manuel, that question was reserved, and the  
25 Court decided where the seizure took place in

1 the first instance by judicial process. There's  
2 a footnote reserving just this case.

3 MR. ALI: Yeah, that's right, Your  
4 Honor. I think, in Footnote 3 --

5 JUSTICE GORSUCH: That's right.

6 MR. ALI: -- Manuel says that it's not  
7 going to decide precisely when legal process  
8 started. And -- and we don't think the Court  
9 should decide it here because Respondent never  
10 raised the issue until its briefing to this  
11 Court. And, you know, as I noted, that --

12 JUSTICE GORSUCH: But would you agree  
13 --

14 MR. ALI: -- that itself made --

15 JUSTICE GORSUCH: -- but would you  
16 agree he was seized by an arrest in the first  
17 instance?

18 MR. ALI: He was seized by an arrest  
19 in the first instance and then seized pursuant  
20 to the initiation of legal process when the  
21 false criminal complaint was what held him over.

22 JUSTICE GORSUCH: Well, the -- a  
23 complaint can be filed whether or not someone is  
24 seized, right? You can file a complaint against  
25 a free person?

1                   MR. ALI: Right. I guess, Your Honor,  
2                   what I'm saying is that for us to succeed on our  
3                   Manuel claim, we're going to have to show that  
4                   it was a seizure pursuant to legal process. We  
5                   accept that. We, of course, also have, like I  
6                   said, the Second Circuit's precedent that was  
7                   also unchallenged by the --

8                   JUSTICE GORSUCH: And then the  
9                   continuing seizure theory that we'd have to  
10                  purchase if we're also buying the -- the  
11                  malicious prosecution tort of the Second  
12                  Circuit, the theory is, as I understand it, that  
13                  your client was seized even when he was released  
14                  on his own recognizance and for the entire  
15                  period until the completion of trial? Is that  
16                  right?

17                  MR. ALI: The Second Circuit precedent  
18                  on that that Respondent never challenged says  
19                  that the travel restrictions that automatically  
20                  apply upon release upon recognizance and also  
21                  consistent with Justice Ginsburg's concurrence  
22                  in Albright -- again, we don't think the Court  
23                  should get into any of this. It's a hard  
24                  question --

25                  JUSTICE GORSUCH: Right, but if we buy

1     malicious prosecution and if we endorse this  
2     tort, part of it, at least in the Second Circuit  
3     and some others is that you're seized even when  
4     you're released on your own recognizance, right?

5             MR. ALI: Well, I don't mean to fight  
6     the premise, Your Honor, but I don't think the  
7     Court has to buy into any of that. The Court  
8     can simply accept, as Respondents did throughout  
9     this entire proceeding, that there was a  
10    cognizable seizure here, and the Second Circuit  
11    can decide whether Respondent waived that  
12    argument or has stated something differently  
13    below.

14            JUSTICE GORSUCH: But your -- your  
15    position is going to be that he was continually  
16    seized through trial, right?

17            MR. ALI: Yes. We believe Respondent  
18    forfeited -- with respect to those seizures, he  
19    -- he forfeited any challenge to those seizures.

20            JUSTICE GORSUCH: And -- and just to  
21    finish up, are -- on that theory, are people  
22    also seized even when they're given a citation  
23    but free to go, released on bail, who receive a  
24    civil process for a -- a subpoena to appear at  
25    trial? Are those persons seized?

1                   MR. ALI: Your Honor, I think the  
2                   reason the bounds of that rule hasn't been  
3                   litigated in this case and I can't answer your  
4                   question is that Respondent never raised it  
5                   below. And so we're proceeding under the  
6                   unchallenged Second Circuit precedent. We, of  
7                   course, also have the seizure that undisputedly  
8                   took place between the time that the criminal  
9                   complaint was filed and that the hearing in this  
10                  --

11                  JUSTICE GORSUCH: Thank you.

12                  MR. ALI: -- case took place.

13                  CHIEF JUSTICE ROBERTS: Justice  
14                  Kavanaugh?

15                  JUSTICE KAVANAUGH: Mr. Ali, the tort  
16                  of unreasonable seizure pursuant to legal  
17                  process, do you accept that that requires the  
18                  plaintiff to prove the elements or some of the  
19                  elements of malicious prosecution, including  
20                  absence of probable cause?

21                  MR. ALI: So the Fourth Amendment --  
22                  to prove his Fourth Amendment violation, yes, we  
23                  agree that Petitioner would have to prove the  
24                  absence of probable cause, but it comes from the  
25                  Fourth Amendment, not from any tort of malicious

1 prosecution.

2 JUSTICE KAVANAUGH: Okay. And then,  
3 to follow up on answers you gave to the Chief  
4 Justice and Justice Breyer -- I just want to  
5 make sure I have this clear -- your answer to  
6 the floodgates argument on the other side is  
7 that there really won't be a floodgates problem  
8 if we don't stick with the Second Circuit and  
9 the other circuit's rule because of two things,  
10 one, the absence of a probable cause requirement  
11 and, two, qualified immunity. Is that an  
12 accurate summary?

13 MR. ALI: And also, as I discussed  
14 with Justice Alito, the causation requirement,  
15 which actually does a lot of work in these  
16 multiple actor cases when you're suing a police  
17 officer.

18 We also, just -- just to be very  
19 clear, we think the favorable termination rule  
20 is not a filtering rule. And so we, you know,  
21 like Chief Justice -- Chief Judge Pryor, find it  
22 hard to figure out how that even factors into  
23 this case.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Ellis.

6 ORAL ARGUMENT OF JONATHAN Y. ELLIS

7 FOR THE UNITED STATES, AS AMICUS CURIAE,

8 SUPPORTING THE PETITIONER

9 MR. ELLIS: Mr. Chief Justice, and may  
10 it please the Court:

11 At common law, the favorable  
12 termination element served three purposes,  
13 namely, avoiding collateral tax on criminal  
14 proceedings through civil suits, avoiding  
15 parallel proceedings over guilt and probable  
16 cause, and avoiding inconsistent criminal and  
17 civil judgments.

18 Because Petitioner's Section 1983  
19 claim, like a malicious prosecution claim,  
20 though not exactly a malicious prosecution  
21 claim, challenges the validity of a criminal  
22 proceeding against him, incorporating a  
23 favorable termination element would well serve  
24 those purposes, and in the government's view,  
25 the court of appeals was right to require



1     Petitioner to show that the criminal proceeding  
2     against him terminated in his favor.

3             The Court erred, however, in requiring  
4     that that termination itself indicate innocence.  
5     That additional requirement finds virtually no  
6     support in the common law of 1871. It does not  
7     serve the purposes of the favorable termination  
8     element. And it would be inconsistent with the  
9     purposes and values of Section 1983 and the  
10    constitutional right that Petitioner asserts.

11            The court of appeals' decision should,  
12    therefore, be reversed. I welcome the Court's  
13    questions.

14            JUSTICE THOMAS: What exactly is that  
15    constitutional right?

16            MR. ELLIS: We understand the  
17    constitutional right the same way Petitioner  
18    does. It's the one that was recognized by this  
19    Court, an unreasonable seizure pursuant -- in  
20    Manuel -- an unreasonable seizure pursuant to  
21    legal process.

22            JUSTICE THOMAS: Okay. What does that  
23    mean? What seizure and what process?

24            MR. ELLIS: So Petitioner discussed  
25    the two different seizures. We endorse the

1 first but not the second at least in theory. We  
2 think a detention on the basis of legal process,  
3 it can be a seizure, is a seizure, within the  
4 Fourth Amendment.

5 We don't endorse the -- the second  
6 theory, the broader one that he's advanced, that  
7 the ordinary burdens of facing trial are also a  
8 seizure under the Fourth Amendment.

9 JUSTICE THOMAS: So what is the  
10 detention based on legal process here?

11 MR. ELLIS: So we think it's actually  
12 unclear from this record if that's, in fact,  
13 what happened. He has alleged in -- in his  
14 complaint and -- and has reasserted here that  
15 the detention post the filing of the criminal  
16 complaint in this case was caused by that  
17 criminal complaint.

18 If he can make that out, we think that  
19 qualifies as a seizure pursuant to legal process  
20 under Manuel and one that would be analogous to  
21 a malicious prosecution claim.

22 JUSTICE GORSUCH: How can that -- how  
23 can that be, counsel, given that McDonough said  
24 that if you -- if you bring someone to  
25 arraignment within 48 hours of arrest, you're

1     presumptively okay? And, here, that happened.

2             And, also, the plaintiff was in the  
3     hospital for a good portion of that, not -- not  
4     actually in detention. And the complaint didn't  
5     -- it was filed during that 48-hour period and  
6     he -- he wasn't arrested pursuant to any legal  
7     process. He was arrested in a warrantless, you  
8     know, arrest. So -- so how does that -- how  
9     does that work?

10            MR. ELLIS: So those are great  
11     arguments that I think could be advanced to why  
12     on remand, if this case as -- as claimed is  
13     reserved or defense is reserved, why, in fact,  
14     he wasn't seized, he wasn't detained because of  
15     that criminal complaint.

16            You may well be right, Your Honor. I  
17     think the -- the -- in this case, it's not  
18     presented because Respondent hasn't forfeited  
19     that claim below, and we don't think that the  
20     Court needs to answer that question to resolve  
21     the question presented, just as it didn't do in  
22     McDonough.

23            If you look in Footnote 4 of  
24     McDonough, it assumed in that case that there  
25     was sufficient deprivation of liberty to trigger

1 the Due Process Clause because it hadn't been  
2 challenged below, and so it could reach and  
3 resolve the question presented on which there  
4 was a circuit split, and it's the same situation  
5 you face here.

6 JUSTICE SOTOMAYOR: Is there a value  
7 for us answering this question outside of this  
8 individual case?

9 MR. ELLIS: Absolutely, Your Honor,  
10 although we --

11 JUSTICE SOTOMAYOR: And in what other  
12 claims would having an answer to this be  
13 helpful?

14 MR. ELLIS: You -- you -- I'm sorry,  
15 you mean the question presented, Your Honor?

16 JUSTICE SOTOMAYOR: Yes, other than in  
17 this case.

18 MR. ELLIS: Sure. So it's not clear  
19 on this record, as I've said --

20 JUSTICE SOTOMAYOR: I don't want this  
21 case.

22 MR. ELLIS: I know. I --

23 JUSTICE SOTOMAYOR: I want to know  
24 what other areas --

25 MR. ELLIS: Sure.

1 JUSTICE SOTOMAYOR: -- of law invoke  
2 malicious prosecution or what other claims  
3 invoke.

4 MR. ELLIS: So we think the answer in  
5 this case would -- would govern any claim under  
6 1983 of a unreasonable seizure pursuant to legal  
7 process. We think you can assume that that was  
8 established here and then go on to resolve that  
9 question, and it will govern in lots of cases,  
10 like Manuel, where there is no dispute anymore,  
11 obviously, that there was a seizure pursuant to  
12 -- to reasonable legal process there.

13 This is the question that the Court  
14 left open at the end of Manuel. That's the  
15 Court -- the answer -- the question that the  
16 Court would be answering in this case, and we  
17 think it does have salience and meaning outside  
18 the context of this particular case.

19 JUSTICE KAGAN: But, Mister --

20 JUSTICE ALITO: What was the -- what  
21 was the seizure pursuant to legal process here?

22 MR. ELLIS: So I think there are two  
23 alleged seizures pursuant to legal process. The  
24 one, as we discussed, the detention, if it,  
25 indeed, was caused by the filing of the criminal

1 complaint.

2 JUSTICE ALITO: Okay.

3 MR. ELLIS: And the second is the  
4 burdens of trial.

5 Now we don't agree with that. We  
6 haven't endorsed that theory. We have serious  
7 doubts that the Fourth Amendment should be read  
8 to govern that you're seized if you're just  
9 required to show up at trial.

10 Our point is only that Respondent  
11 didn't challenge that below. The Court can  
12 assume it, just as it assumed it in McDonough,  
13 and reach and resolve the question presented in  
14 this case.

15 JUSTICE ALITO: Well, this is going to  
16 be a serious question, although it's going to  
17 sound fanciful.

18 Let's say someone is questioning a  
19 medical expert, an expert on lung cancer, and  
20 the question is, Doctor, I'm going to ask you a  
21 question about a centaur, which is a creature  
22 that has the upper body of a human being and the  
23 lower body and the legs of a horse. And what I  
24 want to know is, if a centaur smokes five packs  
25 of cigarettes every day for 30 years, does the

1 centaur run the risk of getting lung cancer?

2 What would the medical expert say to  
3 that?

4 MR. ELLIS: I think he'd say that's a  
5 fanciful question that I -- I can't answer. I  
6 think that's not this case for a couple reasons,  
7 Your Honor.

8 JUSTICE ALITO: But why --

9 MR. ELLIS: I think that that's --

10 JUSTICE ALITO: -- well, what -- what  
11 should I do if I think there is no such thing as  
12 a Fourth Amendment malicious prosecution claim?

13 MR. ELLIS: I --

14 JUSTICE ALITO: Well, assume that it  
15 exists. Assume that there is a centaur and the  
16 centaur is out in the woods smoking cigarettes  
17 like crazy.

18 MR. ELLIS: So I don't think  
19 Petitioner is asserting -- we don't read  
20 Petitioner to be asserting in this Court a  
21 malicious -- a standalone right against  
22 malicious prosecution.

23 We understand, and it's baked into the  
24 question presented, Petitioner to be asserting a  
25 unreasonable seizure pursuant to legal process,

1 just as the Court recognized in Manuel.

2 The malicious prosecution, the  
3 relevance of the tort here, is not in defining  
4 the constitutional violation but into looking to  
5 as the starting point for defining this claim  
6 for damages under Section 1983.

7 I actually think the -- the Court in  
8 Manuel laid out the -- the -- this process very  
9 well from pages 920 to 922. The first step is  
10 identifying the constitutional right at issue.  
11 Manuel did that.

12 The second is to identify, what are  
13 the contours of the 1983 claim for damages? And  
14 that, in turn, looks to the most analogous  
15 common law tort. And we think here --

16 JUSTICE ALITO: Well, let me just ask  
17 one more question and then I'll stop with this  
18 because it may be of no interest to anybody but  
19 me.

20 But the part of -- of the -- of the  
21 claim here that you think is legitimate is a  
22 claim that -- that the Respondent was -- I'm  
23 sorry, that the Petitioner was seized pursuant  
24 to legal process for the period of time between  
25 the filing of the criminal complaint and his



1 release on his own recognizance.

2 That's -- that's what's at issue, and  
3 you want us to say that for that claim that he  
4 should have been released after, let's say, 30  
5 hours instead of 39 hours, there must be a  
6 favorable termination to the subsequent criminal  
7 prosecution? That's what your position is?

8 MR. ELLIS: Yes, Your Honor. And the  
9 reason that is is because that claim is premised  
10 on a claim that the criminal prosecution was  
11 unfounded and unwarranted.

12 And that kind of claim brings into --  
13 up into the case all the concerns that the  
14 favorable termination element was intended to  
15 serve -- to serve and to -- and to prevent. We  
16 think that the Congress of 1871, when it enacted  
17 1983, would have expected a claim that  
18 challenges, directly challenges, the validity of  
19 an ongoing criminal proceeding, would have had  
20 to show, would have included a favorable  
21 termination element to avoid collateral attack  
22 on that proceeding, to avoid parallel  
23 proceedings on guilt and probable cause, and to  
24 avoid inconsistent judgments.

25 We think all of those reasons apply

1 here, just as they applied in Heck, just as they  
2 applied in McDonough, and we think the Court  
3 should incorporate that element into this claim.

4 JUSTICE KAGAN: Mr. Ellis, one way to  
5 resolve this case is to assume a couple of  
6 questions that your brief suggests that we  
7 should resolve, and I want to ask you why it is  
8 that we should resolve them rather than assume  
9 them.

10 I mean, as you said, Manuel identifies  
11 the constitutional claim and then Manuel says,  
12 look, our standard practice when we have a 1983  
13 suit raising that claim is to ask what the most  
14 analogous claim at the common law was. And as  
15 to that question, Manuel says we're not  
16 deciding, we're going to kick it back down,  
17 nobody's really addressed that.

18 Now it turns out almost all the  
19 circuit courts have answered that question by  
20 saying, you know, the most analogous claim is  
21 the malicious prosecution, the old malicious  
22 prosecution claim, and that comes with a  
23 favorable termination rule, and then you have a  
24 split growing out of that, which is like what is  
25 that favorable termination rule.

1           So one way we could decide this is  
2     just to say: We're still not deciding what the  
3     most analogous common law tort is. We're just  
4     sort of going to assume what basically every  
5     circuit court has held, which is that it's the  
6     malicious prosecution tort which is -- is the  
7     most analogous and that that comes with a  
8     favorable termination element. And now we'll  
9     tell you, given that everybody is doing the  
10    case -- the cases in this way, what that  
11    favorable termination route is -- rule is.

12           We could decide it that way, but you  
13    seem to want us to say the most analogous tort  
14    is the malicious prosecution tort. Why would we  
15    do that?

16           MR. ELLIS: So a couple reasons, Your  
17    Honor. I think the first reason is the one that  
18    Justice Alito identified. Answering what the  
19    contours of the favorable termination element in  
20    this particular context for this particular  
21    constitutional claim without deciding it exists  
22    is -- does risk sort of answering how many  
23    packets of cigarettes --

24           JUSTICE KAGAN: No, we do that all the  
25    time.

1                   MR. ELLIS: Fair enough. But the  
2                   second reason, Your Honor, is because there --  
3                   it is the subject of a circuit split, as you  
4                   note, although a lopsided one, and the parties  
5                   have joined issue on this question. We -- we --  
6                   we briefed it in our case. It was briefed in  
7                   the Respondents' case. It was briefed in the  
8                   other amici's case. We think the Court has the  
9                   arguments before it on that question, and I  
10                  think the lower courts would benefit from  
11                  guidance.

12                 JUSTICE KAGAN: I actually don't think  
13                  that this is briefed at all in this case.  
14                  What's briefed in this case is the question of  
15                  what the favorable termination rule is, whether  
16                  -- you know, whether it's Petitioner's version  
17                  or Respondents' version.

18                 What's not briefed in this case is  
19                  whether the most analogous tort under common law  
20                  was malicious prosecution or something else.

21                 MR. ELLIS: So I think, if you look to  
22                  our brief, we briefed it. If you look to the  
23                  DA's brief -- the Chicago brief, they have --  
24                  they have joined issue, and I think Respondent  
25                  has also joined issue on that in their brief.

1                   I -- I think -- we also think it's  
2     just the case -- the question is pretty easy.  
3     And we think a claim like this, where a  
4     petitioner is, JA 33 to 34, directly  
5     challenging, saying that there was a  
6     unreasonable seizure on the basis of an  
7     unfounded prosecution, that's the essence of  
8     malicious prosecution. We think the Court  
9     should answer that question, and I think the  
10    courts of appeals would -- would benefit from  
11    that Court's guidance on that question.

12                  JUSTICE KAVANAUGH: At common law,  
13    malicious prosecution did not require a seizure,  
14    correct?

15                  MR. ELLIS: That's right. So the  
16    Fourth Amendment requires the seizure.

17                  JUSTICE KAVANAUGH: Okay.

18                  MR. ELLIS: That's the first step.  
19    And then the second step is, when you're  
20    challenging a seizure on the basis of a criminal  
21    prosecution, is that analogous to a malicious  
22    prosecution?

23                  Although the common law didn't require  
24    a seizure, it certainly did address it. The  
25    Court recognized that in Heck, and -- and the --

1 and the treatises are clear that detention is --  
2 can be part of the damages of a malicious  
3 prosecution claim.

4 JUSTICE KAVANAUGH: And a malicious  
5 prosecution without a seizure is not cognizable  
6 under 1983? Is that your position?

7 MR. ELLIS: It's certainly not  
8 cognizable under the Fourth Amendment. The  
9 Court rejected it as being cognizable under  
10 substantive due process. In Albright, I guess  
11 it's open technically under the due --  
12 procedural due process. And we haven't taken a  
13 view, although we're skeptical that that would  
14 be --

15 JUSTICE GORSUCH: Well, why --

16 MR. ELLIS: -- a standalone right.

17 JUSTICE GORSUCH: -- why wouldn't that  
18 be the more natural home for a claim called  
19 malicious prosecution aimed at addressing the  
20 misuse of judicial process?

21 MR. ELLIS: If that were the right  
22 that Petitioner was asserting, I think that  
23 might be --

24 JUSTICE GORSUCH: No, no, no.

25 MR. ELLIS: -- more natural.

1 JUSTICE GORSUCH: No, I'm not asking  
2 what Petitioner asserted in this case. Why  
3 wouldn't that just be the more natural home for  
4 any tort called malicious prosecution?

5 MR. ELLIS: It -- it -- it may well  
6 be, Your Honor. We don't take this Court and --  
7 this case to present and we're not asking this  
8 Court to hold that there is a standalone  
9 constitutional right against malicious  
10 prosecution. We're following the Court's  
11 analysis in Manuel and in Heck and in Wallace  
12 and in McDonough.

13 JUSTICE GORSUCH: I -- I got -- okay.  
14 And then you -- you'd agree that if someone's  
15 arrested, they can bring a Fourth Amendment  
16 claim without proving malice or abuse of the  
17 judicial process or favorable termination?

18 MR. ELLIS: I think, if he -- if there  
19 hasn't been -- if the -- a seizure is not  
20 pursuant to legal process, that's Wallace. And  
21 that -- and in that case, you're analogous to a  
22 false imprisonment.

23 JUSTICE GORSUCH: None of those  
24 elements are required. It's only when there's  
25 judicial process?

1                   MR. ELLIS: I think, when there's  
2     judicial process -- I think Wallace all but  
3     answers this question, that once a seizure is  
4     pursuant to legal process, that's a malicious  
5     prosecution or that's analogous, excuse me, to a  
6     malicious prosecution claim, and we think the  
7     favorable termination elements and the reasons  
8     for it have --

9                   JUSTICE GORSUCH: Where else in the  
10    Fourth Amendment do we require proof of  
11    subjective malice?

12                  MR. ELLIS: We actually think it's  
13    pretty unlikely that the malice is part of this  
14    element --

15                  JUSTICE GORSUCH: So that goes too?

16                  MR. ELLIS: -- of this claim. Excuse  
17    me?

18                  JUSTICE GORSUCH: That goes along with  
19    favorable termination?

20                  MR. ELLIS: And so we think favorable  
21    termination is an element --

22                  JUSTICE GORSUCH: That stays?

23                  MR. ELLIS: -- of the claim for  
24    damages.

25                  JUSTICE GORSUCH: But --



1 MR. ELLIS: We think malice is likely  
2 not --

3 JUSTICE GORSUCH: Not.

4 MR. ELLIS: -- for exactly the reason  
5 you identify. Now, if you look to this Court's  
6 case in Nieves, for example --

7 JUSTICE GORSUCH: Why shouldn't we get  
8 rid of favorable termination too?

9 MR. ELLIS: Because the purposes of  
10 the favorable termination element at common law  
11 are equally well served in a case like this,  
12 just like they were in McDonough, even though it  
13 wasn't a requirement of the constitutional  
14 claim.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Thomas, anything further?

17 JUSTICE THOMAS: Nothing for me,  
18 Chief.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer?

21 Justice Alito? No?

22 Justice Kagan?

23 Justice Kavanaugh?

24 Justice --

25 JUSTICE BARRETT: I just have one

1 question. I just have one question.

2 So we look to analogous common law  
3 torts in deciding what's cognizable under 1983,  
4 and you just told Justice Gorsuch essentially  
5 that you just want to pluck out favorable  
6 termination because it makes sense once process  
7 is started for all the reasons we have said in  
8 -- in this line of cases.

9 Where does that come from then? If  
10 we're saying that this tort isn't really  
11 analogous to malicious prosecution as it existed  
12 when 1983 was enacted, where -- why would we  
13 just pluck out that one element because it made  
14 sense?

15 MR. ELLIS: So we do think it is  
16 analogous. We think it's analogous because the  
17 gravamen of the claim, that Petitioner's claim  
18 is -- is precisely the gravamen of a malicious  
19 prosecution claim. We think that would  
20 presumptively bring in the rules for a malicious  
21 prosecution claim where there's a second step.

22 And that second step is asking whether  
23 a particular element or rule is consistent with  
24 the values and purposes of Section 1983 and the  
25 constitutional right that he asserts.

1           If you reject the malice requirement  
2     at that stage, and I think you likely would, it  
3     would because -- it would be because that  
4     element is inconsistent. It is fundamentally  
5     inconsistent with the Fourth Amendment in a way  
6     that we don't think the 1871 Congress would have  
7     anticipated that element to be a part of the  
8     damages claim.

9           But the fundamental -- the favorable  
10    termination element, by contrast, serves all the  
11    same purposes and -- and -- and presents no  
12    fundamental inconsistency. Indeed, it serves  
13    other valuable constitutional purposes. And so  
14    we think that it's in for that reason, and  
15    malice is likely out for the other.

16           JUSTICE BARRETT: Thank you.

17           JUSTICE BREYER: A quick question. Do  
18    you -- do you or the government have any idea of  
19    how many, approximate, malicious prosecution  
20    claims against states or the subdivisions are  
21    brought in the United States every year?

22           MR. ELLIS: I don't have the numbers,  
23    Your Honor. I -- I -- I think, if you're -- if  
24    you're talking about the -- the floodgates  
25    argument, though, Your Honor, I would just point

1 to that there are other elements, and we think  
2 that the qualified immunity and probable cause  
3 are the things that stop frivolous claims.

4 We -- we aren't -- we are -- you know,  
5 we think there's reasonable concerns for obvious  
6 reasons. We just don't think the favorable  
7 termination element is intended to serve that  
8 purpose.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Moore.

12 ORAL ARGUMENT OF JOHN D. MOORE  
13 ON BEHALF OF THE RESPONDENTS

14 MR. MOORE: Mr. Chief Justice, and may  
15 it please the Court:

16 The Second Circuit correctly  
17 interpreted the favorable termination  
18 requirement of Petitioner's malicious  
19 prosecution claim. The circuit's rule requires  
20 that a petitioner -- that a plaintiff bringing a  
21 malicious prosecution claim demonstrate that the  
22 underlying criminal charges ended in a manner  
23 indicative of innocence, meaning that the  
24 charges terminated in favor of the criminal  
25 defendant in a way that reflected on the merits

1 of those claims -- those charges rather. There  
2 -- that rule is supported and finds strong  
3 support in the common law, and it exists for  
4 good reason.

5 The more foundational issue here,  
6 however, is that from the beginning, Petitioner  
7 has asserted a malicious prosecution claim that  
8 is fundamentally not cognizable under the Fourth  
9 Amendment. The -- the allegations that he  
10 brought were directly tied to malicious  
11 prosecution, and the claim that exists and is  
12 recognized in the Second Circuit is a malicious  
13 prosecution claim. It is not an unreasonable  
14 seizure pursuant to a legal process claim. That  
15 was not raised at trial at all.

16 Even turning to the merits -- and,  
17 rather -- so the Court can and should resolve  
18 the case on that basis, alleviating confusion  
19 and discord among the circuits.

20 Even turning to the merits, however,  
21 Petitioner cannot prevail. His reliance on Heck  
22 and McDonough is misplaced. Both of those cases  
23 were due process claims brought against  
24 prosecutors, not a Fourth Amendment seizure  
25 claim brought against a police officer.

1           The rationale for the rule articulated  
2     in those cases is -- doesn't carry as much  
3     weight when applied to the constitutional right  
4     and factual circumstances alleged here.

5           Moreover, the -- his reliance -- his  
6     attempt to rely on the common law of 1871 fares  
7     no better. The common law of 1871 does not  
8     reveal any well-settled rule.

9           Petitioner cannot claim, when his own  
10    cases indicate that there was a conflict of the  
11    authorities, that Congress necessarily intended  
12    to incorporate his proposed rule into the  
13    Section 1983.

14          Modern courts, considering current law  
15    enforcement practices, have increasingly adopted  
16    the indications-of-innocence standard, and we  
17    believe that this Court should do so as well to  
18    the extent that it recognizes a malicious  
19    prosecution claim at all.

20          I welcome the Court's questions.

21          JUSTICE THOMAS: Thank you. You seem  
22    to suggest that the -- below that the false  
23    arrest and unfair trial verdicts would preclude  
24    the -- any recovery on remand. Could you walk  
25    us through that just briefly?

1                   MR. MOORE: So I -- I think the -- the  
2     clearest argument on that point comes from the  
3     so-called fair trial claim, the evidence  
4     fabrication claim.

5                   The jury's verdict there necessarily  
6     found that Petitioner was -- suffered no  
7     deprivation of liberty, no impairment of his  
8     liberty based on fabricated evidence.

9                   If -- if we're bringing a -- a claim  
10    that is in the same ballpark as Manuel, in which  
11    the -- any seizure pursuant to legal process can  
12    be attributed to the police officer as opposed  
13    to the prosecutor and magistrate who ended up  
14    ordering that -- that seizure, then there has to  
15    be some indication of misconduct and  
16    falsification.

17                  And the jury has squarely rejected  
18    that, saying that there was no deprivation of  
19    any liberty, let alone something rising to the  
20    level of a seizure, pursuant to any falsified  
21    evidence.

22                  JUSTICE KAGAN: Why isn't that exactly  
23    the kind of question that we usually allow  
24    courts to figure out on remand, assuming you  
25    haven't forfeited it?

1                   MR. MOORE: Justice Kagan, we -- we  
2 would actually welcome -- to -- to the extent  
3 that the Court is willing to say the malicious  
4 prosecution claim that Petitioner brought that  
5 was litigated at trial and even through the  
6 circuit litigation isn't actually a claim, and  
7 we're going -- you know, we will vacate on that  
8 basis, send the case back to the Second Circuit  
9 to ground --

10                  JUSTICE KAGAN: No, that -- that was  
11 not what I was suggesting. I was suggesting  
12 deciding the question presented here and sending  
13 it back to deal with your arguments about how  
14 that in the end won't do the Petitioner any  
15 good.

16                  MR. MOORE: If -- if Your Honor does  
17 -- if we assume that there's a malicious  
18 prosecution claim and the Court assumes its way  
19 to the question presented, then we would raise  
20 those arguments on -- on remand.

21                  I think, however, that addressing the  
22 fundamental questions is part and parcel of  
23 answering the question presented here because  
24 what the elements of this claim look like, what  
25 favorable termination actually -- what form that



1 actually takes is dependent to a large extent on  
2 what claim is actually being brought.

3 And so Petitioner's claim that the  
4 Heck and McDonough rule settles this question, I  
5 think, is not right. Again, both of those were  
6 due process claims addressing -- that would  
7 necessarily call into question the ongoing  
8 criminal proceeding or an outstanding criminal  
9 judgment.

10 If he's truly challenging the seizure  
11 in this case, then it's hard to see how that  
12 necessarily calls into question any subsequent  
13 conviction that may follow at the end of  
14 proceedings.

15 Just as in Wallace, the Court said  
16 that a challenge to a seizure, admittedly  
17 preprocess there, doesn't -- doesn't implicate  
18 Heck, that we would argue that that rationale  
19 doesn't justify the rule here.

20 It's hard to see --

21 JUSTICE KAVANAUGH: If --

22 MR. MOORE: -- it's hard to see -- I  
23 apologize.

24 JUSTICE KAVANAUGH: No, keep going.

25 MR. MOORE: It's hard to see why

1 finding -- why the initiation of legal process  
2 by -- why -- why the seizure pursuant to legal  
3 process at that early stage would -- in every  
4 instance would require a different result and  
5 why the Court would assume that it did.

6 JUSTICE KAVANAUGH: If we could just  
7 focus on the question presented for a moment and  
8 just isolate that, your proposed rule requiring  
9 indications of innocence would seem to have the  
10 perverse consequence of ensuring that some of  
11 the most deserving plaintiffs, those who are  
12 falsely accused and whose cases were dismissed  
13 early on, could not sue unless they could show,  
14 dig into the prosecutor's mindset, whereas those  
15 who went to trial could sue.

16 And what -- what would be the sense in  
17 having kind of an upside down rule like that or  
18 do you disagree with the premise of that?

19 MR. MOORE: To a large extent I  
20 disagree with the premise. There was  
21 questioning earlier in the argument that  
22 prosecutors dismiss cases for -- for all sorts  
23 of reasons at all stages of proceedings that  
24 have very little to do with the merits.

25 Amici on both sides and the government

1       agree on this.

2                   JUSTICE KAVANAUGH: But they also  
3       disagree in these cases often because the  
4       evidence doesn't hold up.

5                   MR. MOORE: I can put some numbers to  
6       this, Your Honor. The NAACP in Footnote 18 of  
7       their brief, cites a study from the Vera  
8       Institute of Justice, which looked to why  
9       prosecutors dismiss cases. And so after we get  
10      past the -- the screening stage, the police  
11      officer comes in and says here's what happened,  
12      can we press charges?

13                   After we get past that stage, the  
14      insufficiency of the evidence leads to -- is --  
15      is the motivating factor for a prosecutor to  
16      dismiss cases in about 10 to 15 percent of  
17      cases, which leaves 85 to 90 percent of cases  
18      dismissed for reasons wholly independent of the  
19      merits of the case.

20                   JUSTICE KAVANAUGH: Wouldn't that be  
21      picked up under the tort as it has been  
22      articulated by the Second Circuit and other  
23      circuits by the absence of probable cause  
24      requirement and by qualified immunity?

25                   In other words, what extra work is

1     this indications of innocence requirement really  
2     doing that's -- that's necessary to have these  
3     kind of mini trials ahead of time, I guess?

4             MR. MOORE: Well, it depends somewhat  
5     on -- on what claim we're actually talking about  
6     here. If we're talking about a malicious  
7     prosecution claim, the work that it does is it  
8     connects the element of the claim to the party  
9     who is actually being sued.

10            So if we're talking about -- it is  
11     ultimately the prosecutor, not the officer who  
12     decides how to terminate that claim. And it  
13     would be an unusual element to have -- to place  
14     an element in the volitional control of an actor  
15     who is not the actual defendant in the case, and  
16     the prosecutor is immune.

17            So requiring that there be some  
18     reflection on the merits in that favorable  
19     termination element indicates -- it provides  
20     some connection between the element of the claim  
21     and the party who is actually being for the  
22     court.

23            If we're looking to a more -- more  
24     broadly to a Fourth Amendment claim, the -- the  
25     advantage that it provides is a more

1     administrable link on -- on the -- on causation  
2     issues.

3                   JUSTICE KAVANAUGH:   What about the  
4     point that Chief Judge Pryor made that there  
5     really wasn't such a requirement at common law  
6     and so the courts that have maybe mistakenly  
7     relied on the restatement second have just been  
8     mistaken in -- in importing this requirement  
9     into the tort?

10                  MR. MOORE:   So I -- I think that the  
11     law was unsettled, certainly in 1871, on this  
12     question.   And I don't think that the more  
13     modern courts that have looked at that question  
14     have -- have been mistaken.   I think that there  
15     is good reason for the rule that they have  
16     adopted.

17                  And so -- and -- and that -- that  
18     does, again, serve that purpose of providing a  
19     link between the officer conduct and the actual  
20     elements of the claim, the conduct at issue, and  
21     that sort of early and more easily discoverable  
22     filter.

23                  Addressing the common law question --  
24     and I apologize if you have a question?

25                  JUSTICE KAVANAUGH:   Well, if we think

1     it's thin or maybe a draw on the common law, do  
2     you want to answer the -- Justice Kagan had  
3     articulated that question, in other words, what  
4     showing needs to be there and who has the burden  
5     of making that showing? Burden might be the  
6     wrong word, but.

7                 MR. MOORE: Right. So the question  
8     presented poses two alternative rules. And the  
9     fact that one may not have been well settled  
10    under the common law of 1871 doesn't necessarily  
11    mean that the other rule was well settled.

12                So at that point the Court is not  
13    looking to determine what the common law of 187  
14    requires, but is, rather, looking to the -- the  
15    tort law as a source of inspired examples to  
16    inform the Court's own decision as to what the  
17    contours of that element should look like.

18                And in that case the -- the increase  
19    in acceptance among federal circuits and state  
20    courts is -- is in place for good reason. And  
21    that -- that good reason are -- are those that I  
22    -- that I have expressed to Your Honor.

23                And to -- to bolster the point just a  
24    little bit about the common law being unsettled  
25    in 1871, Petitioner's own cases acknowledge that

1       there was a conflict in authorities at the time.

2               He cites to the Cassavere decision.

3       He cites to the Woodman decision. He cites to  
4       the Kennedy decision. He cites to the Stanton  
5       decision. All four of those courts indicate  
6       that the common law was not well settled at the  
7       time.

8               That's not a basis to conclude that,  
9       in fact, the rule was well settled in his favor.

10              JUSTICE BREYER: No, but assuming  
11       that's a wash, look, the actual practices, I  
12       think, don't they suggest the contrary of your  
13       position?

14              I mean, you have to show that there  
15       was no probable cause for the arrest. That's  
16       what he alleges. So there's no probable cause.

17              And then you have to show that it was  
18       terminated, the proceeding, in his favor, the  
19       question is here, I guess, and you also have to  
20       show that the way in which it was terminated  
21       affirmatively indicates his innocence. There  
22       are hardly any cases like that. What they do is  
23       they just say dismissed.

24              Hey, defendant, you object to the case  
25       being dismissed? No. Okay, end of the matter.

1                   Now, I don't know if I'm right. Am I  
2                   right about how -- what normally happens?

3                   MR. MOORE: Normally happens, I --  
4                   it's --

5                   JUSTICE BREYER: All right. If that  
6                   normally happens that way, then what's this  
7                   affirmative -- affirmative indications of  
8                   innocence doing there? After all, it seems as  
9                   if almost all the states and everybody else in  
10                  many of the states, they've gotten along for  
11                  years without it. And it hasn't been -- my  
12                  wonderful example of Jean Valjean just hasn't  
13                  turned up once.

14                  So -- so -- so what are we doing with  
15                  this extra requirement here that can never be  
16                  met? Not -- I overstated -- hardly ever and et  
17                  cetera, and what Justice Kavanaugh said was --  
18                  what's the answer to that?

19                  MR. MOORE: So the answer is that the  
20                  rule exists in the context of malicious  
21                  prosecution claims and that those claims present  
22                  a mismatch between the conduct of the  
23                  prosecution, which is out of the hands of the  
24                  police officer, and the defendant in the civil  
25                  case, who is the police officer.



1           And so courts have been -- given that  
2     division, which was not in place in 1871, courts  
3     have increasingly adopted this standard as a  
4     means -- in a way that reflects the need to tie  
5     the claim at issue to the defendant who is  
6     actually before the court.

7           And requiring that there be a merits  
8     indication in the termination does tie it to the  
9     officer conduct in a way that the -- simply  
10    requiring the prosecution have ended does not.  
11    The mere decision to end the case is in the  
12    hands of the prosecutor. And the officer seldom  
13    if any has -- if any time, has actual authority  
14    to make that determination.

15           CHIEF JUSTICE ROBERTS: Counsel, as  
16    you can tell from the questioning, there's a  
17    real issue in this case about whether we should  
18    be deciding essentially a downstream question  
19    when we haven't resolved an upstream question.  
20    And that's one of your arguments in favor of  
21    dismissing, I guess.

22           But it's kind of a feature of our  
23    jurisdiction that we sometimes will do that. I  
24    mean, if you have a particular question of  
25    whether there's a claim, and then -- a

1 downstream question like what the elements are,  
2 well, it may be a serious issue that has divided  
3 the courts of appeals, you know, what the  
4 elements should be. And we may look at the  
5 prior question, the upstream question, and  
6 decide that may not be ripe for our  
7 consideration at this time. It may be ripe  
8 later on. You know, the two questions might  
9 have had different treatment in the -- in the  
10 different circuits, so that one conflict is ripe  
11 and the other is not.

12 I mean, do we have to wait until that  
13 upstream question is suitable for our  
14 jurisdiction before a direct -- addressing, say,  
15 a sharp conflict in the circuits? We don't have  
16 quite that here, but, you know, the circuits are  
17 divided five to five on the elements. But we  
18 think the upstream question would benefit from  
19 further percolation before we grab it? Is there  
20 anything wrong with that?

21 MR. MOORE: Well, I think that the  
22 problem with doing so is that the -- I believe  
23 it's the upstream question, the more  
24 foundational question --

25 CHIEF JUSTICE ROBERTS: Is there such

1 a cause of action?

2 MR. MOORE: Right. And -- and what it  
3 looks like, and what the basis of that claim is  
4 affects the ultimate resolution of the  
5 downstream question.

6 And merely slapping a label, this is  
7 unreasonable seizure pursuant to legal process,  
8 ultimately papers over distinctions that  
9 continue to exist.

10 And so to take a clear example, the  
11 Court recognized in Manuel that such a claim  
12 existed, and on remand the Seventh Circuit said,  
13 well, there is no malicious prosecution claim at  
14 all. That's not even helpful as an analogy.

15 The Second Circuit, also applying  
16 Manuel, and this is in footnote 1 of the Spak  
17 decision, in footnote 1 the court says we're  
18 considering what amounts to a Manuel claim for  
19 unreasonable seizure pursuant to legal process,  
20 and in this circuit, that means what -- what  
21 amounts to a state law malicious prosecution  
22 claim with a seizure element tacked on at the  
23 end, basically as a form of damages.

24 So the Court, by not addressing that  
25 upstream question, allows confusion even among

1 courts that are purporting to apply the exact  
2 same claim. And that's harmful -- and to return  
3 to the -- the point of a moment ago, that's  
4 harmful because when the courts are then  
5 determining what basis -- what those elements  
6 look like, they are assuming the -- what the  
7 claim is giving rise to that element. And if  
8 they are assuming differently or incorrectly,  
9 that leads to different shapes of the -- of the  
10 rule here.

11 And, again, if this is a malicious  
12 prosecution claim, the rule can't -- is based in  
13 different considerations than if we're talking  
14 about a Fourth Amendment claim.

15 JUSTICE KAGAN: But I -- I think, Mr.  
16 Moore, that that just sort of ignores what the  
17 Chief Justice was putting to you.

18 We have eight circuits that are now  
19 applying a favorable termination rule in  
20 Manuel-type claims. And seven of them are  
21 applying one variant of that rule, and an eighth  
22 comes along and says we ought to be applying  
23 another variant of that rule. And then when you  
24 look at the opinion of that eighth court, you  
25 know, it looks pretty good. And -- and that's a

1     pretty serious position. It might be the right  
2     position.

3                 So eight circuits are applying a  
4     favorable termination rule. Seven of them might  
5     be doing it the wrong way. That seems like a  
6     case we should resolve.

7                 MR. MOORE: Well, just a  
8     foundational -- and I know this isn't the key  
9     point of your question, but I did disagree the  
10    Laskar decision does provide a -- a compelling  
11    view of the historical law.

12                To address the core of your question,  
13    though, the -- the -- addressing that upstream  
14    question, the -- the actual foundational  
15    question, in many ways can help resolve the  
16    downstream effects that follow. And so the  
17    Court is certainly free to assume its way to  
18    that question presented. We agree -- we believe  
19    that we prevail even under that standard.

20                But the --

21                JUSTICE KAGAN: I -- I don't really  
22    see how it does. I mean the upstream question,  
23    the only possible way that it could affect the  
24    downstream question is if we decided that there  
25    was no favorable termination rule at all, in

1     which case the Petitioner definitely wins. So I  
2     don't see why it's a problem to ignore the  
3     upstream question.

4             And, by the way, wasn't this all  
5     addressed at the certiorari stage, where you  
6     came in and said exactly this, and, you know, to  
7     be frank, we ignored you.

8             MR. MOORE: You did grant cert in this  
9     case. Hopefully, now you have the opportunity  
10    to address the issues that -- I -- I don't take  
11    the grant of cert to mean that those issues are  
12    entirely off the table.

13            And to address the original question  
14    as to why -- how we could prevail on the merits  
15    of the question, if we are -- if we are talking  
16    about a malicious prosecution -- the reason that  
17    it matters what the answer to that upstream  
18    question is, which is that Petitioner bases his  
19    explanation for the rule entirely on Heck and  
20    McDonough. But, again, if we're challenging the  
21    seizure point, that doesn't really hold true.

22            And to highlight that point, the Court  
23    should consider the instance of an arrest made  
24    pursuant to a warrant. As the Court noted in  
25    Manuel, that would constitute arrest pursuant to

1 legal process. But an arrest pursuant to a  
2 warrant, it's hard to see how that necessarily  
3 calls into question a conviction that occurs  
4 down the line.

5 And so the basis for his rule that  
6 only finality and consistency and collateral  
7 attacks are at issue doesn't hold if we're  
8 actually challenging a Fourth Amendment -- if  
9 we're talking about a Fourth Amendment issue.

10 It only applies if we're talking about  
11 a common law malicious prosecution claim, a  
12 standalone malicious prosecution claim, that he  
13 agrees doesn't exist. He says everybody agrees  
14 that doesn't exist. And so if that's the --

15 JUSTICE KAVANAUGH: Was that really  
16 true? If we resolve the upstream question --  
17 Justice Kennedy, 27 years ago, said it should  
18 find a home in the due process clause. Wouldn't  
19 that be open to us to so hold, as Justice  
20 Gorsuch also mentioned? Standalone malicious  
21 prosecution?

22 MR. MOORE: Yes, so I -- I may have  
23 gotten carried away with my -- my rhetoric.  
24 There -- the possibility that a standalone  
25 malicious prosecution claim could potentially

1     exist, potentially under procedural due process,  
2     but that's certainly not the claim that was  
3     brought here.

4             And this is where the -- the issue of  
5     the due process claim that Petitioner lost at  
6     trial on becomes particularly salient because  
7     that claim wholly encompasses any conduct that  
8     could be at issue in a reformed --

9             JUSTICE KAVANAUGH:  Yeah, you're back  
10    now the facts of this case, and I take that,  
11    but, you know, on the upstream question, it's  
12    not clear you'll be better off if we -- if we  
13    resolve that in terms of the law.  In other  
14    words, there might be more avenues available for  
15    someone to sue; namely, a standalone malicious  
16    prosecution that does not require you to also  
17    establish a seizure, just a malicious  
18    prosecution under the Due Process Clause.

19            MR. MOORE:  So that -- that may result  
20    and -- and, frankly, under the Second Circuit's  
21    precedents, many of the -- the due process  
22    claims overlap so significantly that I don't  
23    know that we'd be worse off.  I do appreciate  
24    Your Honor's concern for us on that point.

25            I -- the I think best route for the



1 Court to take in this case would be to clarify  
2 that the standalone malicious prosecution claim  
3 that the Second Circuit recognizes is not, in  
4 fact, a claim and that the claim, properly  
5 understood, has to be grounded in Fourth  
6 Amendment concerns.

7 And that requires an actual seizure  
8 that requires causation that's directly linked  
9 to the officer's conduct, akin to what was set  
10 forth in Franks versus Delaware.

11 JUSTICE SOTOMAYOR: That's been  
12 conceded by your adversary. So assuming that  
13 there's no malicious prosecution case -- claim  
14 because they're not claiming there is one,  
15 assuming they say their claim is just a Manuel  
16 claim, an unreasonable seizure pursuant to legal  
17 process, where do you want to be, assuming --  
18 and I don't assume it because that's what Manuel  
19 said, that there was such a claim, we didn't  
20 know what to analogize it to, whether false  
21 arrest, malicious prosecution, or something  
22 else, I thought that was the issue that Manuel  
23 left open.

24 Am I wrong about that?

25 MR. MOORE: No. So Manuel did leave

1 open whether malicious prosecution is the best  
2 analogy for that kind of claim.

3 JUSTICE SOTOMAYOR: It did. But it  
4 assumed that there was a cause of action for  
5 unreasonable -- not assume. It held there was  
6 an unreasonable seizure pursuant to legal  
7 process, correct?

8 MR. MOORE: Yes, it did.

9 JUSTICE SOTOMAYOR: All right. So now  
10 the question is, what do we analogize it to?  
11 What do you want to analogize it to? Because,  
12 if there is such a claim, doesn't it favor you  
13 to analogize it to malicious prosecution that  
14 has so many more prerequisites for success than  
15 a fault -- forget about this case, okay, because  
16 you want to win this case.

17 I assume you have a lot of other such  
18 cases. Doesn't it favor you to want to  
19 analogize it to malicious prosecution?

20 MR. MOORE: It -- it very well may. I  
21 -- I think that it is a difficult question.  
22 It's one that the parties have -- have not  
23 briefed it. The various amici have touched on  
24 it. The City of Chicago is the most in-depth  
25 treatment of that subject.

1 JUSTICE SOTOMAYOR: You haven't  
2 addressed it because you've addressed the  
3 question presented, which is what are the  
4 elements of a malicious prosecution claim.

5 MR. MOORE: That -- that's right, Your  
6 Honor, which is the claim --

7 JUSTICE SOTOMAYOR: That's what's  
8 being addressed here. So why don't we answer  
9 what's being addressed.

10 MR. MOORE: Because the -- to return  
11 to a point that I was making earlier, what that  
12 element looks like depends on what right is  
13 actually being asserted. And if we're --

14 JUSTICE SOTOMAYOR: How?

15 MR. MOORE: If -- if the assertion is  
16 that there was an unreasonable seizure, then the  
17 rationale -- the Heck and McDonough rationale  
18 carries far less weight, and it would be a  
19 mistake to assume that this -- or we would urge  
20 the Court not to assume that the same rationale  
21 necessarily applies to an --

22 JUSTICE SOTOMAYOR: Why?

23 MR. MOORE: The Court -- the --

24 JUSTICE SOTOMAYOR: Wouldn't --  
25 wouldn't -- isn't the Heck thinking that if

1     you're seized pursuant to legal process, that we  
2     should wait until that legal process ends before  
3     you can bring a claim and we should bring -- and  
4     we should not bring a case -- and we only should  
5     bring a case if it's been terminated?

6             MR. MOORE: I think I -- I would add a  
7     little bit to that explanation. It's not merely  
8     the existence of legal process, but it's the  
9     fact that challenging the -- that bringing the  
10    civil suit, the 1983 claim, would necessarily  
11    impugn in Heck an outstanding conviction. In  
12    McDonough, that was expanded to include also  
13    ongoing proceedings.

14            But a challenge to a seizure, and,  
15    again, particularly if we're talking an arrest  
16    pursuant to a warrant, does not necessarily  
17    challenge that aspect. It does not challenge  
18    and necessarily impugn the ongoing proceeding.  
19    It doesn't necessarily impugn any outstanding  
20    criminal conviction.

21            I believe Justice Alito raised the  
22    point earlier that you could imagine a situation  
23    in which evidence came along later that either  
24    exonerated or completely led to the conviction.

25            JUSTICE SOTOMAYOR: But that's true of

1 any case. In every case, there are different  
2 grounds to defend. The issue is whether or not  
3 what do you analogize this to, not because on  
4 your particular case you have a better argument  
5 on seizure, but on whether or not the case below  
6 has finished so that an action now makes sense?

7 MR. MOORE: So to -- I take Your Honor  
8 to be saying that it would be a almost  
9 case-by-case inquiry as opposed to looking to --

10 JUSTICE SOTOMAYOR: No, it's not a  
11 case-by-case inquiry. The point is case-by-case  
12 there are different defenses. In some, you  
13 might defend the seizure prong. In others, you  
14 might defend the probable cause. In others, you  
15 might defend on qualified immunity.

16 On this one, you chose to defend on  
17 favorable termination. So the question here  
18 that you're choosing to defend on is what is a  
19 favorable termination, correct?

20 MR. MOORE: Yes.

21 JUSTICE SOTOMAYOR: And so, if that  
22 question is common to all, maybe not in dispute  
23 in some but common to all, why don't we just  
24 answer that question?

25 MR. MOORE: I don't think that the

1 element would necessarily be common to all. And  
2 I think that a due process claim where the  
3 ongoing proceedings were necessarily impugned  
4 might implicate Heck concerns and -- and, thus,  
5 bring that rationale in, whereas a seizure claim  
6 would not.

7 And if -- if those are different -- if  
8 there are different claims implicating different  
9 rights, then I -- I -- I think that we can't  
10 safely assume that in all of those cases, any  
11 case where there is legal process, it's  
12 necessarily going to require the exact same  
13 treatment of the elements.

14 JUSTICE SOTOMAYOR: All right. Thank  
15 you.

16 MR. MOORE: Given that the rationale  
17 for Petitioner's rule doesn't necessarily apply  
18 to the claim that he is now claiming to bring,  
19 given that the common law is at best unsettled  
20 in 1871 and in the modern era is trending  
21 increasingly toward favoring a merits-based  
22 determination, we urge the Court to affirm the  
23 Second Circuit's rule of the malicious -- of the  
24 malicious prosecution elements to the extent  
25 that the Court does not determine, does not

1     decide, to rule on the basis that the malicious  
2     prosecution claim Plaintiff -- Petitioner  
3     brought simply does not exist under the -- under  
4     the -- under the constitutional provision that  
5     he claims.

6             CHIEF JUSTICE ROBERTS:  Thank you,  
7     counsel.

8             Justice Thomas?

9             JUSTICE THOMAS:  None for me, Chief.

10            CHIEF JUSTICE ROBERTS:  Justice  
11     Sotomayor?  Nothing further?

12            Justice Kagan?

13            Justice Gorsuch?

14            JUSTICE GORSUCH:  Two quick questions,  
15     I hope.  First, whether I answer the upstream  
16     question or the downstream question, I have to  
17     be interpreting the Fourth Amendment here,  
18     right?

19            MR. MOORE:  Yes, Your Honor.

20            JUSTICE GORSUCH:  Okay.  And if -- if  
21     I don't think the Fourth Amendment speaks to any  
22     of this -- second question -- because it doesn't  
23     speak to process, it doesn't speak to malice,  
24     and it doesn't speak to favorable termination,  
25     isn't that potentially, as you were discussing

1 with Justice Sotomayor, a much more favorable  
2 set of rules for plaintiffs in the mine-run of  
3 cases?

4 MR. MOORE: So we -- we think that --  
5 so in -- in that -- in the instance that Your --  
6 Your Honor is positing, we think the best course  
7 would be to not specify whether there's malice,  
8 whether there's favorable termination, but to --  
9 to answer your question more directly, we think  
10 that a -- a true Fourth Amendment claim, not one  
11 that has been twisted into what is essentially a  
12 state law -- what is, in effect, a state law  
13 malicious prosecution claim, we think that that  
14 does favor us because, unlike the current Second  
15 Circuit law --

16 JUSTICE GORSUCH: That wasn't my  
17 question.

18 MR. MOORE: I apologize.

19 JUSTICE GORSUCH: My question was,  
20 isn't that more favorable to plaintiffs in the  
21 mine-run of cases --

22 MR. MOORE: The answer is --

23 JUSTICE GORSUCH: -- not to have to  
24 prove these things?

25 MR. MOORE: -- I -- I -- I don't -- I



1 don't think so. And if -- if I -- if I may  
2 explain. The reason I -- I don't think so is  
3 that a true Fourth Amendment claim is not going  
4 to have many of the malicious prosecution --  
5 much of the malicious prosecution underbrush  
6 that currently plagues the Second Circuit's case  
7 law on the subject.

8 And so we're confident that a true  
9 Fourth Amendment claim with an actual seizure  
10 requirement, with actual causation, that we will  
11 prevail certainly in this case and in the  
12 mine-run of cases when the analysis is properly  
13 understood.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16 Justice Barrett?

17 JUSTICE BARRETT: I have one. So I'm  
18 following up on Justices Kagan and Sotomayor  
19 asking you about our choices and how to resolve  
20 this case. And one is to focus on the question  
21 presented, which really just focuses on what  
22 does it mean for a termination to be favorable  
23 and does a dismissal count, or we can, you know,  
24 talk about the upstream -- the upstream issue  
25 that you've devoted most of your brief and most

1 of your argument.

2 So I wonder if it's fair to infer that  
3 you think that your assessment of the case is  
4 that you're on relatively weaker ground on the  
5 question presented about what counts as a  
6 favorable termination and that you think your  
7 stronger argument is the upstream argument?

8 MR. MOORE: We -- we think that we  
9 prevail on either ground. We think that the  
10 more helpful --

11 JUSTICE BARRETT: Which is your  
12 stronger argument?

13 MR. MOORE: We think the stronger  
14 argument is that there -- that the claim  
15 Petitioner brought, which is a -- as pled and as  
16 argued a malicious prosecution claim --

17 JUSTICE BARRETT: The upstream  
18 argument?

19 MR. MOORE: The upstream argument.

20 JUSTICE BARRETT: Yes.

21 MR. MOORE: That that is not a claim  
22 that -- that exists under the Fourth Amendment.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 MR. MOORE: Thank you.

2 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
3 Ali?

4 REBUTTAL ARGUMENT OF AMIR H. ALI  
5 ON BEHALF OF THE PETITIONER

6 MR. ALI: Thank you, Mr. Chief  
7 Justice.

8 Just two quick points. First, I  
9 think, given that I answered questions from a  
10 lot of directions, initially it would be helpful  
11 to just be clear about what we think the Court  
12 needs to hold.

13 We think the Court granted this case  
14 to decide a deep and pointed conflict between  
15 the federal circuits, and all the Court needs to  
16 say is something like this: The Second Circuit  
17 decided this case on the basis that the  
18 favorable termination rule we have applied to  
19 certain Section 1983 claims requires indications  
20 of innocence. It does not. A criminal  
21 proceeding terminates in favor of the accused  
22 when it ends and the prosecution has failed to  
23 obtain a conviction. That's the thrust of it.  
24 That's three sentences; two, if you like,  
25 semi-colons.

1                   And just coming to the actual merits  
2     of the QP and kind of the second point I just  
3     mentioned in stating what the Court should hold,  
4     we agree with Chief Judge Pryor that the common  
5     law is very clearly on our side, virtually  
6     unanimous, unanimous outside of Rhode Island.

7                   And we are left still wondering what  
8     the statutory hook for reading the  
9     indications-of-innocence standard into the  
10    statute is. I heard policy arguments from my  
11    friend on the other side. I heard arguments  
12    about kind of nose counting state courts, which,  
13    by the way, in their briefing, they only still  
14    get to a minority. We think it's far fewer than  
15    20, but even on their own terms, they only get  
16    to 20.

17                  And the choice is between a clear rule  
18    that was developed over centuries at common law  
19    and is categorical or a rule that requires  
20    federal courts to hold these civil mini trials  
21    in which they are looking for something that  
22    courts don't even know what it means.

23                  It's quite extraordinary, right?  
24    Federal courts, circuit courts, lower courts,  
25    usually just understand their task to be to

1     apply the precedent. In this instance, we've  
2     pointed to a number of panels of federal judges  
3     and district court judges who have said we have  
4     no idea what this thing means. We're actually  
5     just going to skip the question entirely. In  
6     the Southern District of New York case we cite,  
7     the -- the court says we're actually just going  
8     to go straight to trial because I don't want to  
9     decide this question and get into the sticky  
10    issues unless I really have to.

11               We think that's pretty extraordinary.  
12    We think the Court should adopt common sense,  
13    that the -- a criminal proceeding terminates in  
14    favor of the prosecution when it gets the  
15    conviction that it sought; a criminal proceeding  
16    terminates in favor of the accused when it  
17    doesn't.

18               If there are no further questions, we  
19    ask that the Court reverse and remand for  
20    further proceedings.

21               CHIEF JUSTICE ROBERTS: Thank you,  
22    counsel.

23               The case is submitted.

24               (Whereupon, 12:46 p.m., the case was  
25    submitted.)

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